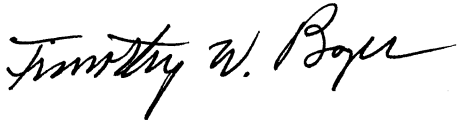


Memorandum

To : Honorable Carole Migden, Chairwoman
Honorable Claude Parrish, Vice Chairman
Honorable Bill Leonard
Honorable John Chiang
Honorable Steve Westly

Date: October 27, 2004

From : Timothy W. Boyer 
Chief Counsel

Subject: **AB71: Civil Penalties and
Delegation of Authority to decide
Cigarette License Suspensions**

For violations of the new cigarette tax enforcement law, a retailer is subject to civil penalties as established and enforced by the Board of Equalization. The attached informal issue paper describes both the violations and accompanying suggested monetary penalties (Attachment 1). At the next board meeting, I will ask the Board for its approval to implement the penalties as provided for in the paper.

The second issue outlined in the paper is a discussion of the appeal procedures that result from being cited, as referenced above, for violating AB 71. I would request the Board delegate authority to staff to hear and decide suspension appeals (Attachment 2). Suspension of a license is for the less severe violations of this law. For purposes of revocation of a license, which is a serious consequence, it is proposed that such be heard at a non-delegable appeal hearing before the Board.

This matter is on the Nov. 4th agenda, under item P: "Other Administrative matters."

In summary, I am proposing two Board actions:

- 1) Adoption of the fine schedule and appeal process;
- 2) Delegate the authority to staff to hear appeals of fines and penalties through the suspension process.

cc: Mr. Ramon Hirsig
Attachments (2)

ATTACHMENT 1

- ☐ For Information
☐ For Discussion
☒ For Decision Making

BOARD OF EQUALIZATION
INFORMAL ISSUE PAPER

**Civil Penalties and Appeal Procedures for Violations of AB 71 -
The California Cigarette and Tobacco Products Licensing Act of 2003**

Issues

1. What civil penalties should be imposed for AB 71 violations?
2. What appeal procedures should the Board establish for AB 71 violations?

Background

To address the problem of untaxed purchases and illegal sales of cigarettes and tobacco products in California, AB 71 enacted the California Cigarette and Tobacco Products Licensing Act of 2003 (hereafter "the Act"). The Act imposes licensing and various other requirements on all retailers, wholesalers and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes.

Any violation of the Act, except the failure to display a license, may result in either a criminal or civil citation issued by the Board. The Act authorizes the Board to impose civil penalties (suspension or revocation of a license and/or fines) when a civil citation is issued. When a criminal citation is issued, the Act authorizes the Board to impose additional civil penalties after a court has imposed criminal penalties (fines and/or jail time). With few exceptions, the civil penalties provided in the Act are not mandatory and, therefore, the Board has discretion in determining the civil penalties to be imposed.

The Investigations Division and the Excise Taxes and Fees Division (Excise Division) are responsible for implementing the provisions of the Act. The Investigations Division is conducting over 800 field inspections of retailers, wholesalers, and distributors per month. In addition to ongoing seizures of unstamped cigarettes, licensees are being warned verbally when violations of the Act are observed. Now that the Board has approved limited peace officer status for designated Investigations Division employees for a six-month period, BOE inspectors will begin issuing criminal or civil citations when appropriate. It is therefore necessary to determine the appropriate civil penalties to be imposed and the appeal procedures to be followed.

The purpose of this issue paper is to seek the Board's approval for imposition of civil penalties for violations of the provisions of the Act as set forth in the *AB 71 Penalty Table* (Attachment A). This issue paper also seeks approval of appeal procedures for the civil penalties imposed.

Discussion of Issue 1 –

What Civil Penalties Should be Imposed for AB 71 Violations?

Statutory Authority¹

In addition to any other civil or criminal penalty, Business and Professions Code (hereafter “BPC”) section 22974.7 provides that “upon a finding that a retailer has violated any provision of [the Act], the board may take the following actions:

- (a) In the case of the first offense, the board may revoke or suspend the license or licenses of the retailer pursuant to the procedures applicable to the revocation of a license set forth in Section 30148 of the Revenue and Taxation Code.
- (b) In the case of a second or any subsequent offense, in addition to [suspension or revocation], the board may impose a civil penalty in an amount not to exceed the greater of either of the following:
 - (1) Five times the retail value of the seized cigarettes or tobacco products.
 - (2) Five thousand dollars (\$5,000).”

BPC section 22980.3(a) further provides that licenses issued under the Act “shall be subject to suspension or revocation for violations of the provisions of [the Act or the Revenue and Taxation Code (hereafter “RTC”) as follows:]

- (1) In addition to any applicable fines or penalties for a violation, upon first conviction of a violation, a licensee shall receive a written notice from the board detailing the suspension and revocation provisions of this act. At its discretion, the board may also suspend a license for up to 30 days.
- (2) In addition to any applicable fines or penalties for a violation, upon a second conviction of a violation within four years of a previous violation the license shall be revoked.”

Staff Recommendation

To ensure fairness and consistency in the enforcement of AB 71, staff recommends approval of the civil penalties listed in Attachment A for violations of the Act. The civil penalties will be imposed only after a criminal conviction has been obtained or the Board’s civil adjudication process, as discussed in Issue 2 below, is complete.

The following provides an overview of the civil penalty recommendations in Attachment A:

- (1) A first civil citation for any violation(s) of the sections listed below will result in the issuance of a Warning Notice to the licensee. The Warning Notice advises the licensee that the violation(s) will be entered into the licensee’s permanent record as a first offense, which means that a future violation will result in a civil penalty as a second offense.

¹ All statutory references cited herein apply to retailers. Similar provisions exist for other licensees.

BPC § 22974	Failure to retain purchase invoices.
BPC § 22980.1(c)(d)	Purchases from unlicensed, suspended or revoked manufacturer/person.
BPC § 22980.1(g)	Acquiring cigarettes in violation of RTC 30163.
BPC § 22980.2(a)	Unlicensed sales of cigarettes & tobacco products.

(2) A first criminal or civil citation² for any violation(s) of the sections listed below will result in a 10-day or a 30-day suspension or a revocation, depending on the severity of the violation. In cases involving multiple violations, the violation punishable with the longest suspension period or revocation will be used for penalty assessment. No fine will be imposed for additional violation(s) listed on a first citation.

BPC § 22973	False statements on application.
BPC § 22974.3	Sale or possession of unstamped cigarettes.
BPC § 22980(b)	Failure to allow inspection.
RTC § 30474.1	Sale or possession of counterfeit cigarettes or tobacco products.

(3) A second and each subsequent criminal or civil citation for violation(s) of the BPC sections listed in either (1) or (2) above will result in a 30-day suspension or revocation, depending on the nature of the violation(s), plus a civil fine up to \$5000 or five times the retail value of any cigarettes/tobacco products seized, whichever is greater.

(4) The following civil penalties are mandatory by statute:

- BPC § 22974.5 - Any first or subsequent civil citation for failure to display the license results in a \$500 fine.
- BPC § 22980.3 - A second criminal conviction within four years for the same violation results in license revocation.

Discussion of Issue 2 –

What Appeal Procedures Shall the Board Establish for AB 71 Violations?

Statutory Authority

The Act requires the Board to provide the following notice and hearing before suspending or revoking a license:

- 10-day notice and hearing to allow licensee to show cause why the license should not be suspended or revoked. (BPC section 22974.7(a) and RTC section 30148.)
- 60-day notice to licensee before revocation or suspension. (RTC section 30459.6.)

² Depending on the factual circumstances of the case, as well as the success of previous attempts at criminal prosecution for similar violations, BOE inspectors may issue a civil citation rather than a criminal citation for these violations.

Staff Recommendation

Staff is recommending that the following appeals be available to a licensee before the imposition of any civil penalties.

- Warning Notices, \$500 fines, or 10-day suspensions: The licensee has the opportunity for a hearing with the Chief of the Excise Division or a designee whose decision will be final.³
- 30-day suspensions and associated fines: The licensee has the opportunity for a hearing with the Chief of the Excise Division or a designee and further appeal to the Appeals Division whose decision will be final.
- Revocations and associated fines: The licensee has the opportunity for a direct appeal to the Board for a final determination.

Overview of Citation Processing and Appeal Procedures:

When the Excise Division receives a copy of a citation from the Investigations Division, the Excise Division will mail the licensee a Warning Notice or a Notice of Violation, depending on the statutes violated, which will reference the citation issued and the violation(s) observed. The Notice of Violation will indicate the penalties to which the licensee is subject. Both notices will provide information regarding appeal rights. The Notice of Violation will specify a date 60 days from the date of the notice when the license may be suspended or revoked. This meets the statutory requirements of notice before actual suspension or revocation.

If the licensee appeals, a hearing will be scheduled to allow the licensee an opportunity to show cause why the violation(s) should not be added to the licensee's permanent record and why the license should not be suspended or revoked or why fines should not be imposed. Upon approval of the staff recommendations set forth above, the Excise Division will hear appeals of Warning Notices, \$500 fines, and suspensions. Thirty-day suspensions and associated civil fines may be further appealed to the Appeals Division. Appeals of license revocations and associated civil fines will go directly to the Board for final adjudication. Any civil fines will be issued as demand billings after appeal of the citation has been adjudicated.

If the licensee does not respond to the Notice of Violation, waives his or her right to a hearing, or fails to appear at a scheduled hearing, the Excise Division will notify the licensee of the suspension and issue a demand billing for applicable civil fines. Cases involving license revocations will go to the Board Proceedings Division for inclusion in the Board's non-appearance or consent calendar.

Requested Board Action

Staff is requesting approval of the penalty provisions set forth in Attachment A and the appeal procedures described above.

Attachment A – AB 71 Penalty Table - Retailers

³ In a separate memorandum, staff is recommending that the Board delegate to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees the authority to hold and decide license suspension hearings and appeals of citations that would subject a licensee to fines.

Attachment A

AB 71 Penalty Table - Retailers¹

1st Citation = Suspension or Revocation, No Fine Except for Failure to Display License²

Statute/Violation	Penalty ³
BPC § 22973 – False statements on application	10 or 30-Day Suspension or a Revocation
BPC § 22974 – Retention of purchase invoices	Warning Notice
BPC § 22974.3 – Sale or possession of unstamped cigarettes	30-Day Suspension
BPC § 22974.5 – Failure to display license	\$500 Fine (mandatory)
BPC § 22980(b) – Failure to allow inspection	30-Day Suspension
BPC § 22980.1(c)(d) – Purchases from unlicensed, suspended or revoked manufacturer/person	Warning Notice
BPC § 22980.1(g) – Acquiring cigarettes in violation of RTC § 30163	Warning Notice to retailers 10-Day Suspension for wholesalers and distributors
BPC § 22980.2(a) – Unlicensed sales of cigarettes & tobacco products	Warning Notice
RTC § 30474.1 – Sale or possession of counterfeit cigarettes or tobacco products	10 or 30-Day Suspension

2nd & Subsequent Citation(s) = Fine(s) + Suspension or Revocation

Statute/Violation	Penalty
BPC § 22974.5 – Failure to display license	\$500 (mandatory)
All other AB 71 BPC violations	Up to the greater of \$5000 or 5X value of cigarettes/tobacco products seized plus a 30-Day Suspension or a Revocation
BPC § 22980.2(c) – Continued sales after notice of revocation/suspension	Revocation of license
BPC § 22980.3 – 2 nd conviction within four years for the same violation	Revocation of license (mandatory)

¹ Unless otherwise indicated, the same penalties are proposed for manufacturers, importers, wholesalers, and distributors, only the referencing statutes will change. Where a penalty range is indicated, the Excise Division will determine the actual penalty based on the severity of the offense.

² Fines may be imposed for the “second or any subsequent offense” (B&P 22974.7(b)), which could be interpreted to mean the 2nd or any succeeding violation in a multiple-violation 1st citation. For the 1st citation, however, regardless of the number of violations, no fines will be assessed and the penalty will be a license suspension or revocation (B&P 22974.7(a)). No suspension for failure to display a license; statute requires a \$500 fine (B&P 22974.5).

³ Violation punishable with the longest suspension controls. All other suspensions will run concurrently. Where two or more violations in the same citation have the same suspension period, one will be selected as the punishable violation with penalties for the others to run concurrently.

ATTACHMENT 2

Memorandum

To: Honorable Carole Migden, Chairwoman
Honorable Claude Parrish, Vice Chairman
Honorable Bill Leonard
Honorable John Chiang
Honorable Steve Westly

Date: October 27, 2004

From: Timothy W. Boyer
Chief Counsel

Subject: Request for Delegation of Authority

Recommendation

Staff recommends that the Board delegate to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees the authority to hold and decide license suspension hearings and appeals of citations that subject a licensee to fines under the *California Cigarette and Tobacco Products Licensing Act of 2003*.

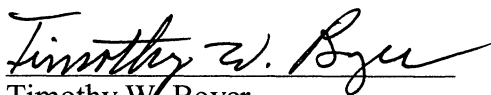
Background

Assembly Bill 71, the California Cigarette and Tobacco Products Licensing Act of 2003 ("the Act"), codified into law primarily in the Business and Professions Code, requires the licensing of all retailers, wholesalers and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes. It also provides for fines and the suspension or revocation of licenses under certain conditions related to the conviction or final adjudication of a violation of the Act.

The Act provides for suspensions or revocations using the hearing process set forth in Revenue and Taxation Code section 30148. Section 30148 requires the Board to provide the licensee with a hearing, after at least 10-day notice, to show cause why his or her license should not be revoked. As discussed in the Issue Paper entitled *Civil Penalties and Appeal Procedures for Violations of AB 71 – The California Cigarette and Tobacco Products Licensing Act of 2003*, staff has recommended that 10-day license suspension hearings be decided by the Chief of the Excise Taxes and Fees Division or a designee without further right of appeal. A licensee subject to a 30-day suspension and associated fines would have the right to appeal the suspension to the Appeals Division for final decision. Staff is also recommending the right to appeal citations that would result in imposition of fines and is seeking delegation of authority with regard to appeals of such citations.

Currently there is no delegation of authority in place authorizing Board staff to hold and decide license suspension hearings or appeals of citations under the Act. In order to implement the recommendations of the aforementioned Issue Paper, staff is seeking a delegation of authority to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees to hold and decide license suspension hearings and appeals of citations that would subject a licensee to fines.

Recommended by:



Timothy W. Boyer
Chief Counsel

Approved by:



Ramon J. Hirsig, Executive Director

BOARD APPROVED

At the _____, 2004 Board Meeting

Deborah Pellegrini, Chief
Board Proceedings Division